

# Federal Habeas Corpus: An Abridged Sketch

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## Summary

Federal habeas corpus is a procedure under which a federal court may review the legality of an individual's incarceration. It is most often the stage of the criminal appellate process that follows direct appeal and any available state collateral review. The law in the area is an intricate weave of statute and case law.

Current federal law operates under the premise that with rare exceptions prisoners challenging the legality of the procedures by which they were tried or sentenced get "one bite of the apple."

Relief for state prisoners is only available if the state courts have ignored or rejected their valid claims, and there are strict time limits within which they may petition the federal courts for relief.

Moreover, a prisoner relying upon a novel interpretation of law must succeed on direct appeal; federal habeas review may not be used to establish or claim the benefits of a "new rule."

Expedited federal habeas procedures are available in the case of state death row inmates if the state has provided an approved level of appointed counsel. The Supreme Court has yet to hold that a state death row inmate who asserts he is "actually innocent" may be granted habeas relief in the absence of an otherwise constitutionally defective conviction. The Court has made it clear in the case of the Guantanamo detainees that the privilege of the writ may not be legislatively extinguished unless there is an adequate substitute, *Boumediene v. Bush*.

This is an abridged version of CRS Report RL33391, *Federal Habeas Corpus: A Brief Legal Overview*, by Charles Doyle, without the footnotes or appendixes, and without most of the quotation marks and citations to authority found in the original.

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## Introduction

Colonial America was well acquainted with habeas corpus and with occasional suspensions of the writ. The drafters of the United States Constitution, after enumerating the powers of Congress, inserted the limitation that “the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Consistent with the common law, the writ was available to those confined by federal officials without trial or admission to bail, but was not available to contest the validity of confinement pursuant to conviction by a federal court of competent jurisdiction, even one whose judgment was in error. In 1867, Congress substantially increased the jurisdiction of federal courts to issue the writ by authorizing its issuance “in all cases,” state or federal, “where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”

Early in the forties, the Court stopped requiring that an alleged constitutional violation void the jurisdiction of the trial court before federal habeas relief could be considered. Federal judges soon complained that federal prisoner abuses of habeas had become “legion.” Congress responded by incorporating into the 1948 revision of the judicial code the first major revision of the federal habeas statute since 1867. State courts exerted little pressure for revision of the federal habeas statute in 1948. Although habeas relief had been available to state prisoners by statute since 1867 and subsequent decisions seemed to invite access, the hospitality that federal habeas extended to state convicts with due process and other federal constitutional claims had not yet become apparent.

This all changed over the next two decades. Some of the change was attributable to expansive Supreme Court interpretations of the procedural guarantees of the Bill of Rights and of the extent to which those guarantees were binding upon the states through the due process clause of the Fourteenth Amendment. By the early seventies, the Supreme Court had begun to announce a series of decisions grounded in the values of respect for the work of state courts and finality in the process of trial and review. Thus, state prisoners who fail to afford state courts an opportunity to correct constitutional defects are barred from raising them for the first time in federal habeas in the absence of a justification. Nor may they scatter their habeas claims in a series of successive petitions. Those who plead guilty and thereby waive, as a matter of state law, any constitutional claims, may not use federal habeas to revive them. And state prisoners may not employ federal habeas as a means to assert, or retroactively claim the benefits of, a previously unrecognized interpretation of constitutional law (i.e., a “new rule”).

## Contemporary Limits on the Exercise of Habeas Jurisdiction

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), codified, supplemented, and expanded upon the Court’s limitations on the availability of the writ. AEDPA was the culmination and amalgamation of disparate legislative efforts, including habeas proposals, some of them stretching back well over a decade. Its adjustments help define the contemporary boundaries of the current writ.

### Deference to State Courts

The AEDPA bars federal habeas relief on a claim already passed upon by a state court “unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an

unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” An unreasonable application of clearly established federal law, as determined by the Supreme Court “occurs when a state court ‘identifies the correct governing legal principle from [the] Court’s decisions but unreasonably applies that principle to the facts of’” the case before it. Moreover, the Court has said on several occasions, the question before the federal courts when they are confronted with a challenged state court application of a Supreme Court recognized principle is not whether the federal courts consider the application incorrect but whether the application is objectively unreasonable. On the other hand, a decision is contrary to clearly established federal law, as determined by the Supreme Court, if it applies a rule that contradicts the governing law set forth in the Supreme Court’s cases, or if it confronts a set of facts that is materially indistinguishable from a decision of the Court but reaches a different result. Obviously, a state court determination of a question which relevant Supreme Court precedent leaves unresolved can be neither contrary to, nor an unreasonable application, of Court precedent.

## **Exhaustion**

The deference extended to state courts reaches not only their decisions but the opportunity to render decisions arising within the cases before them. State prisoners were once required to exhaust the opportunities for state remedial action before federal habeas relief could be granted. The AEDPA preserves the exhaustion requirement, and reenforces it with an explicit demand that a state’s waiver of the requirement must be explicit. On the other hand, Congress appears to have been persuaded that while as a general rule constitutional questions may be resolved more quickly if state prisoners initially bring their claims to state courts, in some cases where a state prisoner has mistakenly first sought relief in federal court, operation of the exhaustion doctrine may contribute to further delay. Hence, the provisions of 28 U.S.C. 2254(b)(2) authorize dismissal on the merits of mixed habeas petitions filed by state prisoners.

## **Successive Petitions**

The AEDPA bars repetitious habeas petitions by state and federal prisoners. Under earlier law, state prisoners could not petition for habeas relief on a claim they had included or could have included in earlier federal habeas petitions unless they could show cause and prejudice or a miscarriage of justice. Cause could be found in the ineffective assistance of counsel; the subsequent development of some constitutional theory which would have been so novel at the time it should have been asserted as to be considered unavailable; or the discovery of new evidence not previously readily discoverable. A prisoner unable to show cause and prejudice might nevertheless be entitled to federal habeas relief upon a showing of a “fundamental miscarriage of justice.” This required a showing by clear and convincing evidence that but for a constitutional error, no reasonable juror would find the petitioner guilty or eligible for the death penalty under applicable state law. The Court’s pre-AEDPA tolerance for second or successive habeas petitions from state prisoners was limited; the tolerance of the AEDPA is, if anything, more limited. If the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed in all cases. A claim not mentioned in an earlier petition must be dismissed unless it falls within one of two narrow exceptions: (A) it relies on a newly announced constitutional interpretation made retroactively applicable; or (B) it is predicated upon newly discovered evidence, not previously available through the exercise of due diligence, which together with other relevant evidence establishes by clear and convincing evidence that but for the belatedly claimed constitutional error no reasonable factfinder would

have found the applicant guilty. Moreover, the exceptions are only available if a three judge panel of the federal appellate court authorizes the district court to consider the second or successive petition because the panel concludes that the petitioner has made a prima facie case that his claim falls within one of the exceptions. And the section purports to place the panel's decision beyond the en banc jurisdiction of the circuit and the certiorari jurisdiction of the Supreme Court. The Supreme Court, in *Felker v. Turpin*, held that because it retained its original jurisdiction to entertain habeas petitions neither the gatekeeper provisions of section 2244(b)(3) nor the limitations on second or successive petitions found in sections 2244(b)(1) and (2) deprive the Court of appellate jurisdiction in violation of Article III, §2. At the same time, it held that the restrictions came well within Congress' constitutional authority and did not amount to a suspension of the writ contrary to Article I, §9. In *Castro v. United States*, the Court held that section 2244(b)(3)(E), constraint upon its certiorari jurisdiction is limited to instances where the lower appellate court has acted on a request to file a successive petition, and does not apply to instances where the lower appellate court has reviewed a trial court's successive petition determination.

## Statute of Limitations

The AEDPA established a one year deadline within which state and federal prisoners must file their federal habeas petitions. The period is tolled during the pendency of state collateral review. When the state appeal is not filed in a timely manner, when it is untimely under state law, that is the end of the matter for purposes of 2244(d)(2). Amendments, submitted after the expiration of a year, to a petition filed within the one year period limitation, that assert claims unrelated in time and type to those found in the original petition do not relate back and are time barred. A state may waive the statute of limitations defense, but its intent to do so must be clear and not simply the product of a mathematical miscalculation. The statute of limitations provisions initially presented a novel problem for district courts faced with mixed petitions of exhausted and unexhausted claims. As a result of the interplay between AEDPA's one-year statute of limitations and *Lundy's* dismissal requirement, petitioners who come to federal court with mixed petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims. If a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under *Lundy* after the limitations period has expired, this will likely mean the termination of federal review. Nevertheless, the district court is under no obligation to warn pro se petitioners of the perils of mixed petitions. Although cautioning against abuse if too frequently employed, the Court endorsed the stay and abeyance solution suggested by several of the lower courts, under which in appropriate cases, the portion of state prisoner's mixed petition related to exhausted habeas claims are stayed and held in abeyance until he can return to a state court and exhaust his unexhausted claims.

## Appeals

Appeals are only possible upon the issuance of certification of appealability (COA), upon a substantial showing of a constitutional right. A petitioner satisfies the requirement when he can show that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. This does not require the petitioner show a likelihood of success on the merits; it is enough that reasonable jurists would find that the claim warrants closer examination. Should the district have dismissed the habeas petition on procedural grounds, a COA may be issued only upon the assessment that reasonable jurists would consider both the merits of the claim and the procedural grounds for dismissal debatable.

## Default

In *Wainwright v. Sykes* and the cases that followed its lead, the Court declared that state prisoners who fail to raise claims in state proceedings are barred from doing so in federal habeas proceedings unless they can establish both “cause and prejudice.” The Court later explained that the same standard should be used when state prisoners abused the writ with successive petitions asserting claims not previously raised, and when they sought to establish a claim by developing facts which they had opted not to establish during previous proceedings. Of the two elements, prejudice requires an actual, substantial disadvantage to the prisoner.

What constitutes cause is not easily stated. Cause does not include tactical decisions, ignorance, inadvertence or mistake of counsel, or the assumption that the state courts would be unsympathetic to the claim. Cause may include the ineffective assistance of counsel; some forms of prosecutorial misconduct; the subsequent development of some constitutional theory which would have been so novel at the time it should have been asserted as to be considered unavailable; or the discovery of new evidence not previously readily discoverable.

Federal courts may entertain a habeas petition, notwithstanding default and the failure to establish cause, in any case where failure to grant relief, based on an error of constitutional dimensions, would result in a miscarriage of justice due to the apparent conviction of the innocent, *Murray v. Carrier*, *supra*. In order to meet this “actually innocent” standard, the prisoner must show that “it is more likely than not that no reasonable juror would convict him.” When the petitioner challenges his capital sentence rather than his conviction, he must show “by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.” This miscarriage of justice exception, whether addressed to the petitioner’s guilt or sentence, is a matter that can be taken up only as a last resort after all nondefaulted claims for relief and the grounds for cause excusing default on other claims have been examined.

## Actual Innocence

In *Herrera v. Collins*, the Court splintered over the question of whether newly discovered evidence of actual innocence, without some procedural error of constitutional magnitude, permitted habeas relief. Chief Justice Rehnquist, author of the opinion for the Court, finessed the issue by assuming without deciding that at some quantum of evidence of a defendant’s innocence the Constitution would rebel against his or her execution. Short of that point and cognizant of the availability of executive clemency, newly discovered evidence of the factual innocence of a convicted petitioner, unrelated to any independent constitutional error, does not warrant habeas relief.

*House v. Bell* came to much the same end. House supplied evidence of his innocence of sufficient weight to overcome the procedural default that would otherwise bar consideration of his habeas petition. Whatever burden a hypothetical freestanding innocence claim would require, however, the record in *House* (new evidence and old) was not sufficient.

*In re Davis* affords the Court the opportunity to consider anew the issue it put aside in *Herrera* and *House*—may habeas relief be granted on the basis of a freestanding claim of innocence, and if so, what level of persuasion is required before such relief may be granted. The Supreme Court transferred Davis’ habeas petition to the U.S. District Court for the Southern District of Georgia to receive evidence and make findings concerning Davis’ innocence. Justice Scalia, joined by Justice Thomas, characterized the transfer as a “fool’s errand,” since in their view the lower court

may not grant habeas relief regardless of its findings. Justice Stevens, in a concurrence joined by Justices Ginsburg and Breyer, disagreed.

## Harmless Error

The mere presence of constitutional error by itself does not present sufficient grounds for issuance of the writ unless the error is also harmful, i.e., “unless the error had a substantial and injurious effect or influence in determining the jury’s verdict.” The writ will issue, however, where the court has grave doubt as to whether the error was harmless.

## New Rules and Retroactivity

Under *Teague v. Lane* a new rule cannot be sought through federal habeas and a new rule may only be applied retroactively for the benefit of habeas petitioners when (1) the new interpretation places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or places a certain category of punishment for a class of defendants because of their status or offense beyond the power of the criminal law-making authority to proscribe, or (2) the new interpretation significantly improves the pre-existing fact finding procedures which implicate the fundamental fairness of the trial and without which the likelihood of an accurate conviction is seriously diminished. The Court has more recently indicated that the rules covered in the first exception, the exception for rules that place certain conduct beyond proscriptive reach, are more accurately characterized as substantive rather than procedural rules and thus not subject to the *Teague* rule from the beginning. The Court observed in *Beard v. Banks* that it has yet to rule on a case that satisfied this second *Teague* exception.

## Opting In

The AEDPA offered procedural advantages to the states in order to ensure the continued availability of qualified defense counsel in death penalty cases. It gave the states three options. A state could elect not to take advantage of the expedited procedures, in which case it would be governed by the usual habeas provisions. Alternatively, a state could “opt in” and elect to provide a mechanism for the appointment and compensation of counsel to assist indigent state prisoners under sentence of death in state post-conviction review (state “habeas” proceedings). Finally, rather than use the mechanism for appointment of counsel for a separate level of state collateral proceedings, a state could use the mechanism in conjunction with a unified system of review which merges state direct appeals and collateral review. The USA PATRIOT Improvement and Reauthorization Act simplifies the election by dropping the “unitary review” provision. States may opt in if they provide for assistance of counsel in a manner approved by the Attorney General. When a state opts in, federal habeas review of a claim filed by a state death row inmate is limited to issues raised and decided on the merits in state court unless the state unlawfully prevented the claim from being raised in state court, or the claim is based on a newly recognized, retroactively applicable constitutional interpretation or on newly unearthed, previously undiscoverable evidence. In cases where the federal habeas application has been filed by a prisoner under sentence of death under the federal law or the laws of a state which has opted in, the government has a right, enforceable through mandamus, to a determination by the district court within 450 days of the filing of an application and by the federal court of appeals within 120 days of the filing of the parties’ final briefs.



## Habeas for Federal Convicts

Federal prisoners, who claim that they are being held by virtue of a conviction or sentence rendered contrary to the Constitution or laws of the United States, must ordinarily repair to section 2255 of title 28 of the United States Code for collateral review. Congress added section 2255 when it revised title 28 in 1948 to expedite review. The section “replaced traditional habeas corpus for federal prisoners.... The purpose and effect of the statute was not to restrict access to the writ but to make postconviction proceedings more efficient.” The section “was intended to mirror §2255 in operative effect,” although there occasionally are differences between the two. The Antiterrorism and Effective Death Penalty Act (AEDPA) amended the provisions governing access to habeas by state prisoners, but in some instances it made comparable changes in section 2255.

Thus, both the state inmate’s habeas petition and federal convict’s section 2255 motion must be filed within a year after their direct appeals become final. “An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.” As for procedural default, “[w]here the petitioner—whether a state or federal prisoner—failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes cause for the waiver and shows actual prejudice resulting from the alleged violation.”

The Supreme Court has yet to address the question of whether the *Teague* rule, which requires that a new constitutional interpretation be claimed on direct appeal rather in habeas, applies to section 2255. The Court has noted, however, that the lower federal courts have applied the *Teague* rule to section 2255. The statutory provisions governing both similarly restrict relief for second or successive invocations, but they do so in different terminology.

## Congressional Authority to Bar or Restrict Access to the Writ

One of the most interesting and perplexing features of federal habeas corpus law involves the question of Congress’ authority to restrict access to the writ. The Constitution nowhere expressly grants a right of access to the writ, although it might be seen as an attribute of the suspension clause or the due process clause or both. Yet the suspension clause says no more than that “the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,” U.S. Const. Art.I, §9, cl.2. And the due process clause speaks with an equal want of particularity when it declares that, “no person shall ... deprived of life, liberty, or property, without due process of law,” U.S. Const. Amend. V. Balanced against this, is the power of Congress to “ordain and establish” the lower federal courts, U.S. Const. Art. III, §1; to regulate and make exceptions to the appellate jurisdiction of the Supreme Court, U.S. Const. Art. III, §2, cl.2; to enact all laws necessary and power to carry into effect the constitutional powers of the courts as well as its own, U.S.Const. Art. I, §8, cl.18; and at least arguably the power to suspend the privilege to the writ in times of rebellion or invasion, U.S. Const. Art. I, §9, cl.2.

## Exceptions Clause and the Original Writ

The question as to the scope of Congress’ control over Court’s appellate jurisdiction in habeas cases surfaced when a prisoner challenged the AEDPA’s habeas limitations in *Felker v. Turpin*. In

particular, *Felker* argued that the provisions which declared the appellate court determination of whether to authorize a second or successive habeas petition was neither appealable nor subject to a petition for rehearing or for a writ of certiorari. The Court took no offense to the limitation of habeas appellate jurisdiction. Since the AEDPA does not repeal the Court's authority to entertain a petition for habeas corpus, there can be no plausible argument that the act has deprived the Court of appellate jurisdiction in violation of Article III, §2. Review remained possible under the original writ of habeas corpus.

## Suspension of the Privilege of the Writ

The *Felker* Court disavowed any contention that the AEDPA's provisions violated the suspension clause. It did not stop with the proposition that the suspension clause does not extend to convicted prisoners or any other prisoners ineligible for the writ under common law, however, but assumed that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789. Even under this relaxed standard it found any claim based on *Felker*'s case wanting. The AEDPA's limitation on repetitious or stale claims was seen as a variation of *res judicata*, which in the area of habeas had been an evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions. The added restrictions which the act places on second habeas petitions are well within the compass of this evolutionary process and do not amount to a suspension of the writ contrary to Article I, §9. Shortly after *Felker*, however, the Court narrowly construed Congressional efforts to restrict review of various immigration decisions and recognized that the courts retained jurisdiction to review habeas petitions, with the observation that otherwise serious suspension clause issues would arise.

The Court was compelled to face the issue of Congress' constitutional authority to absolutely bar access to the writ, which the Court avoided in *Felker*, in *Boumediene v. Bush*. *Boumediene* was among the foreign nationals detained at the U.S. Naval Station at Guantanamo Bay, Cuba. The Military Commissions Act stripped federal courts of habeas jurisdiction over the Guantanamo detainees. The government argued that noncitizens designated as enemy combatants and detained in territory located outside our nation's borders have no constitutional rights and no privilege to habeas corpus. The detainees disputed both claims. They argued that the legislation violated the Suspension Clause, which declares that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Court began with the observation that, "[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." The Framers also remembered the history of the English writ with its periodic suspensions of the writ. "In our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the right of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of government that is itself the surest safeguard of liberty."

These separation of powers concerns and the history of the territorial scope of the writ led the Court to conclude that Article I, § 9, clause 2 of the Constitution has full effect at Guantanamo Bay. And so the question became, did the suspension clause bar curtailment of habeas jurisdiction in the manner of the Military Commissions Act provision? Since the Military Commissions Act did not constitute a formal suspension of the writ, the issue was whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has

provided adequate substitute procedures for habeas corpus in the Detainee Treatment Act's combatant status review tribunal procedures.

The Court identified, in context of *Boumediene*, the essential features of habeas corpus and any adequate substitute. First, it noted that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application of interpretation of relevant law." Second, "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings." Thus, "when a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is more pressing." Third, "[f]or the writ of habeas corpus, or its substitute to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occur during [prior] proceedings." Fourth, it must have "some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding."

The Court found the Detainee Treatment Act procedures wanting when assessed against the standards of an adequate substitute for normal habeas procedures. Thus, the provision of the Military Combatants Act, purporting the curtail habeas jurisdiction with respect to Guantanamo detainees, was found to constitute an unconstitutional suspension of the writ.

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